

HOUSE OF LORDS

Secondary Legislation Scrutiny Committee

39th Report of Session 2019–21

**Interim report
on the Work of
the Committee in
Session 2019–21**

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HL Paper 200

Secondary Legislation Scrutiny Committee

The Committee's terms of reference, as amended on 11 July 2018, are set out on the website but are, broadly:

To report on draft instruments and memoranda laid before Parliament under sections 8, 9 and 23(1) of the European Union (Withdrawal) Act 2018.

And, to scrutinise –

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in the terms of reference.

The Committee may also consider such other general matters relating to the effective scrutiny of secondary legislation as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

<u>Baroness Bakewell of Hardington Mandeville</u>	<u>Viscount Hanworth</u>	<u>The Earl of Lindsay</u>
<u>Rt Hon. Lord Chartres</u>	<u>Lord Hodgson of Astley Abbotts</u>	<u>Lord Lisvane</u>
<u>Rt Hon. Lord Cunningham of Felling</u>	(Chair)	<u>Lord Sherbourne of Didsbury</u>
<u>Lord German</u>	<u>Lord Liddle</u>	<u>Baroness Watkins of Tavistock</u>

Registered interests

Information about interests of Committee Members can be found in the last Appendix to this report.

Publications

The Committee's Reports are published on the internet at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/publications/>

Committee Staff

The staff of the Committee are Christine Salmon Percival (Clerk), Philipp Mende (Adviser), Jane White (Adviser) and Ben Dunleavy (Committee Assistant).

Further Information

Further information about the Committee is available at <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/>

The progress of statutory instruments can be followed at <https://statutoryinstruments.parliament.uk/>

The National Archives publish statutory instruments with a plain English explanatory memorandum on the internet at <http://www.legislation.gov.uk/uksi>

Contacts

Any query about the Committee or its work, or opinions on any new item of secondary legislation, should be directed to the Clerk to the Secondary Legislation Scrutiny Committee, Legislation Office, House of Lords, London SW1A 0PW. The telephone number is 020 7219 8821 and the email address is hlseclegscrutiny@parliament.uk.

EXECUTIVE SUMMARY

In the period under review, we considered 901 statutory instruments (SIs) and 33 other instruments. This is above the average for each of the calendar years 2016 to 2019, but below the level reached in the period of most intensive Brexit preparation. The details of the instruments laid, the Departments which laid them, and the Committee's observations on general trends are set out in the section on Committee Activity of this report (paragraphs 33–43).

In addition, in this report, we draw attention to a number of factors which we consider to be of significance both as to what has happened in the period under review but, no less importantly, as to their potential impact on the future effectiveness of parliamentary scrutiny. These are:

- Emergency legislation and the quality of Explanatory Memoranda (paragraphs 8–15)
- Incomplete revocations (paragraph 16)
- Inconsistent sunset provisions (paragraph 17)
- The pandemic as a pretext for significant policy changes (paragraphs 18–19)
- Blurring of legislation and guidance (paragraphs 20–21)
- Inadequate Impact Assessment (paragraphs 22–23)
- Restricting parliamentary scrutiny (paragraphs 24–28)
- Increased use of “skeleton bills” (paragraphs 29–32)
- Overlarge complex SIs (paragraph 39)

This has been, as it has been for other committees, a busy year. We are pleased that the House has found our work helpful in its scrutiny of secondary legislation, as evidenced by reference to our reports in debates in the House.

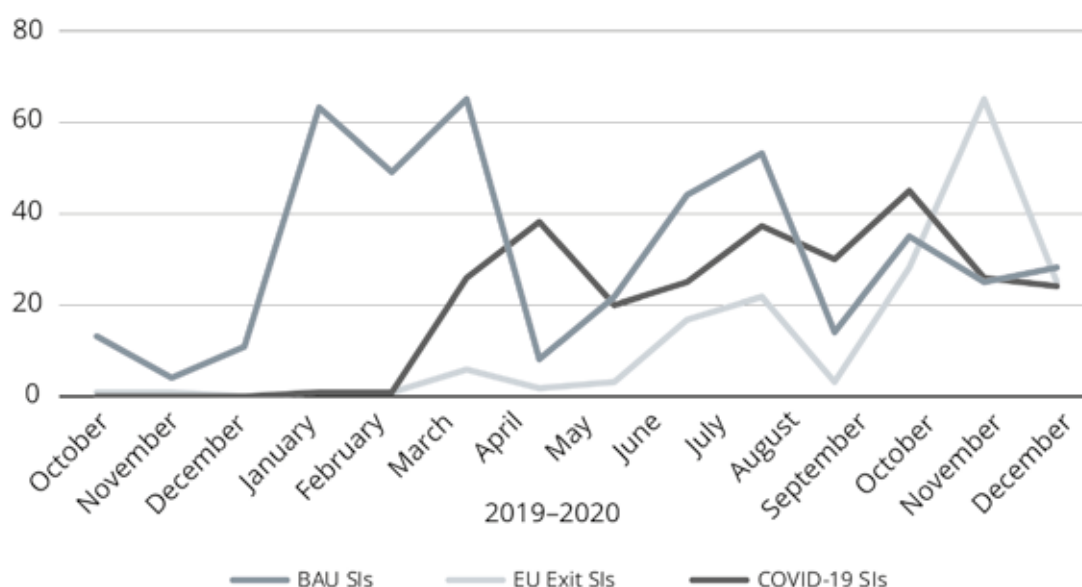
Finally, in this year of all years, we are particularly grateful to our support staff who, despite this pandemic, have provided such timely and expert analysis. Without their efforts, our work would be impossible.

Interim report on the Work of the Committee in Session 2019–21

THE FIRST YEAR OF SESSION 2019–21

1. Until recently, the Secondary Legislation Scrutiny Committee (SLSC) has published a report at the end of every session providing statistics and observations on its activity during that session. Because of the unusual length of the 2017–19 session, we instead published Interim Reports at 12-monthly intervals so that any recommendations that we had to make remained relevant.
2. Given that we do not know when the current session will end, we have decided again to publish an Interim Report looking at our activity during the first 12 months of the session, up to 18 December 2020 — for the purposes of this report, we call this period “Year 1”.
3. This has been a turbulent year involving three main strands of work: EU Exit legislation; COVID-19 legislation; and “business as usual” (BAU) activities. Chart 1 shows how these different strands have fluctuated over Year 1.

Chart 1: EU Exit v COVID-19 v BAU SIs for year 1 of session 2019–21



Number of statutory instruments laid in Year 1

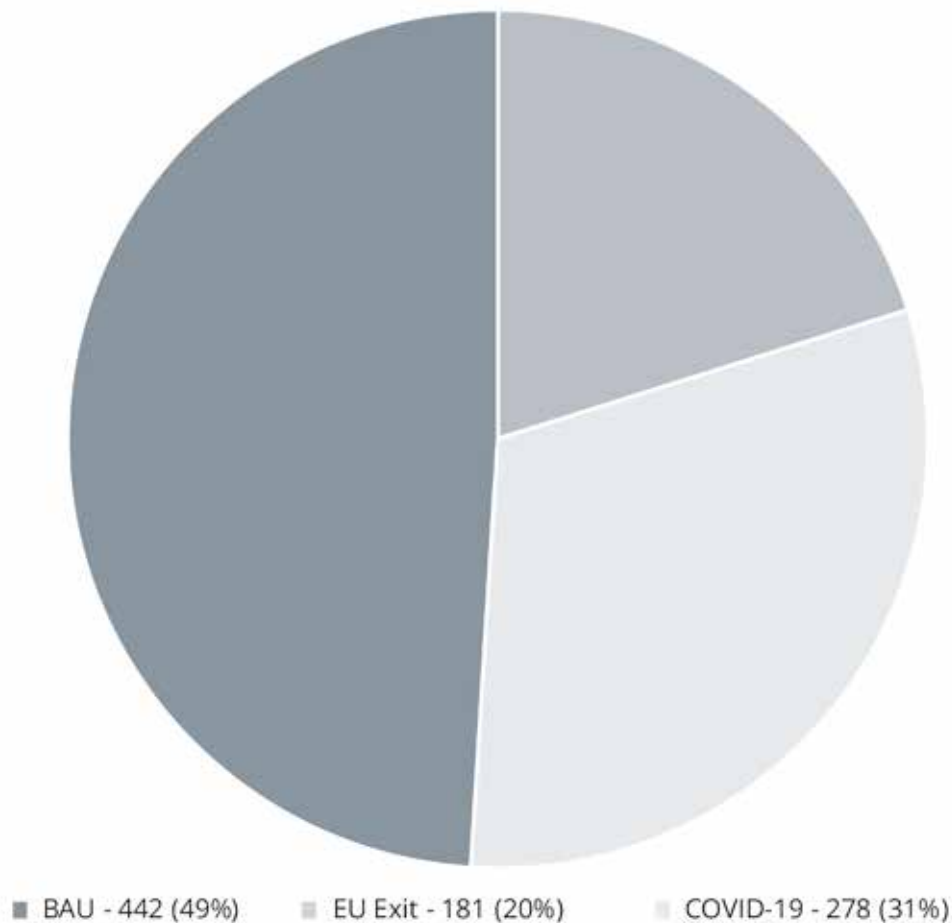
4. In Year 1, 901 statutory instruments (SIs)¹ were laid for scrutiny, of which 308 were affirmatives (34.2%) and 593 negatives (65.8%). This is above the average of 665 SIs received in each of the calendar years 2016 to 2019 but below the 1,002 SIs laid in Year 2 of the 2017–19 session (the period from 14

¹ As well as SIs, the Committee considers almost all instruments subject to parliamentary procedure, for example, statutory Codes and Immigration Rules but the term “SIs” is used in this report as shorthand for all the instruments within our remit. The Committee no longer scrutinises treaties. This work is now undertaken by the EU International Agreements Sub-Committee of the European Union Select Committee.

April 2018 to 13 April 2019) when Brexit preparations were at their height. We also considered one Special Procedure Order and 32 Proposed Negative instruments.

5. At nearly 35%, the proportion of affirmative instruments was well above the normal 20% and, at times, for example in October 2020, it rose to nearly 50%. That peak was a combination of made affirmatives being laid to deal with the second wave of COVID-19 and draft affirmatives to update the statute book in preparation for the end of the EU Exit Transition Period.²

Chart 2: Total SIs for year 1 of session 2019–21



6. The number of correcting instruments received rose to 9.5% in Year 1, well above the 5% benchmark figure. The number of Explanatory Memoranda (EMs) which needed to be replaced, at 5.9%, also exceeded the acceptable rate.
7. Further detail is given in the section on Committee Activity below (see paragraphs 33–43).

² Draft affirmative instruments have to be approved by each House before they can be made law; made affirmatives have immediate effect and have to be approved within a period specified in the parent Act (for example, 28 days for some COVID-19 instruments) to prevent the legislation lapsing.

EMERGENCY LEGISLATION AND THE QUALITY OF EMS

8. In our first Interim Report of session 2017–19, we said that “Brexit pressure” would not be an acceptable excuse for any decrease in the quality of explanatory material accompanying instruments.³ We take the same view with regard to COVID-19 instruments — **the fact that the majority have been brought into effect within days makes it even more important that their intention and effect are made clear to both Parliament and the public.**
9. The quality of EMs accompanying COVID-19 instruments has been mixed. One of the poorest examples was laid by the Ministry of Justice (MoJ), which we drew to the special attention of the House.⁴ The instrument provided for steps to reduce the risks associated with the outbreak of coronavirus in prisons, including a power to prevent visits. In our view, the EM focused too narrowly on the changes being made as a result of the pandemic without providing sufficient information about how the regime would normally operate. Supplementary material submitted by MoJ led us to be concerned about whether the long-term effects of isolation on prisoners had been properly considered. (We note that a subsequent instrument has removed the power of the Secretary of State to extend the regime incrementally.)⁵
10. Most COVID-19 instruments have been laid by the Department of Health and Social Care (DHSC) (with significant numbers also laid by HM Treasury (HMT), the Department for Business, Energy and Industrial Strategy (BEIS), the Department for Transport (DfT) and the Ministry of Housing, Communities and Local Government (MHCLG)). It was therefore disappointing that we found a number of EMs laid by DHSC to be unsatisfactory. At an early stage, the Department produced a standard format EM for coronavirus SIs which lost sight of the EM’s purpose to explain the rationale for the specific change being made by the instrument in question. For example, Section 2 of the EM is intended to act as a signpost to the contents of the instrument and assist in distinguishing it from another with a similar title. Unhelpfully, DHSC tended to use a standard phrase which amounted to little more than stating that the regulations would provide for public health measures to deal with coronavirus.
11. Fuller use of that section would have been a real benefit in relation to the series of rapidly amended local lockdown instruments that were laid between May and September, the titles of which became longer and more intertwined: for example, the *Health Protection (Coronavirus, Restrictions) (North of England, North East and North West of England and Obligations of Undertakings (England) etc.) (Amendment) Regulations 2020*.⁶ In our view, the simpler numerical approach adopted by DfT to amending the International Travel Restrictions was preferable, and their short descriptions were exemplary.

3 *26th Report*, Session 2017–19 (HL Paper 125) — see para 49 onwards.

4 Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules 2020 ([SI 2020/508](#)), *16th Report*, Session 2019–21 (HL Paper 68).

5 Prison and Young Offender Institution (Coronavirus, etc.) (Amendment) (No. 3) Rules 2020 ([SI 2020/1077](#)).

6 Health Protection (Coronavirus, Restrictions) (North of England, North East and North West of England and Obligations of Undertakings (England) etc.) (Amendment) Regulations 2020 ([SI 2020/1057](#)).

12. The policy explanations provided in the EMs accompanying many DHSC instruments were also unsatisfactory. They usually included a cumulative history of the previous instruments for that area, many of which were obsolete by the time the new SI was laid, and then ended with a short statement such as: “so this instrument will apply easements made elsewhere in England on 25 July to the areas”, without mentioning what those “easements” were, offering any evidence as to why the change was justified or how it would affect the level of coronavirus controls in the area in question. The original EM to SI 2020/954 is a particularly poor example.⁷ (It was subsequently revised at our request).
13. Because there were so many variations in the controls imposed on individual councils, the legislation came across as confusing and, unfortunately, the EMs often failed to assist in dispelling that confusion. Clarity was further blurred when, towards the end of the period of local lockdowns, to impose stronger infection control, DHSC moved council areas between the North of England regulations and the North East and North West regulations, regardless of the geographical location of the council affected.⁸
14. We have also been concerned about the number of minor changes in policy made by individual instruments. Not only does this add to the workload of Departments and Parliament, it is also unhelpful to have them scattered between so many instruments. The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place and on Public Transport) (England) (Amendment) (No. 2) Regulations 2020 (SI 2020/1021), for example, were corrected twice in 24 hours.⁹
15. **We recommend that the Government should, in due course, conduct a full evaluation of the way the emergency legislation was approached, and we look forward to seeing the outcome of such a review.** We will also raise some of these issues with the Permanent Secretaries, next time they come to give evidence to the Committee.

7 See Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford, Leicester, and North of England) (Amendment) Regulations 2020 ([SI 2020/954](#)).

8 See Health Protection (Coronavirus, Restrictions) (North of England and North East and North West of England Etc.) (Amendment) Regulations 2020 ([SI 2020/1074](#)) in *29th Report*, Session 2019–21 (HL Paper 138).

9 By SIs [2020/1026](#) and [2020/1028](#).

SPECIAL CONCERNS ABOUT SIS LAID DURING THE PANDEMIC

Incomplete revocations

16. DHSC’s explanations of the three-Tiers regulations¹⁰ and the second national lockdown regulations¹¹ (which included some supporting data at paragraph 7.1 of the EM) were an improvement. Each of these revoked some (but not all) of the predecessor regulations. Unfortunately, this partial approach meant that the House has debated several instruments that had already been revoked.¹² Other instruments were simply left to lapse.¹³ **While legislating at this speed and frequency is exceptional, we recommend that an evaluation of the emergency legislation should include consideration of how information about which instruments were superseded or had lapsed could have been provided more effectively.**

Inconsistent sunset provisions

17. Earlier in the year, we noted that some regulations were being laid because sunset provision in previous regulations had lapsed without being noticed.¹⁴ Prompted by this, and being aware that coronavirus SIs contained a variety of different sunset provisions — some lapsing after six or eight months, some linked to the Coronavirus Act 2020 so that they would lapse when the pandemic was declared to be over, and others simply left open-ended — we wrote to the Lord President and Leader of the House of Commons, the Rt Hon Jacob Rees-Mogg MP, asking where and how the sunset provision in coronavirus instruments was being monitored.¹⁵ Mr Rees-Mogg’s response included an initial list with instruments’ expiry dates by Department and, since then, we have been publishing monthly updates to it in our reports. We believe that this information is of interest to the House and the public more widely. **In circumstances such as these, we recommend that the Government should publish a “dashboard” webpage which clearly shows which instruments are still in effect and those for which the sunset provision has expired.**

The pandemic as a pretext for significant policy changes

18. We have been particularly vigilant about the inclusion of permanent policy changes in instruments intended to address the immediate and temporary crisis of the pandemic. Many permanent changes have been unexceptional — for example, allowing documents to be sent to an authority by email — but others have given us cause for concern. For example, although only a pilot scheme at this stage, we questioned the use of the pandemic as a rationale for the legislation to accelerate and expand the introduction of electric scooters.¹⁶
19. Of greater concern was MHCLG laying several SIs to make substantial and wide-ranging changes to planning legislation, including the creation of new

10 SIs [2020/1103](#), [1104](#) and [1105](#).

11 [SI 2020/1200](#).

12 [Timeline — SI 2020/935 — Statutory Instruments — UK Parliament](#) — the instrument was revoked on 22 September but subsequently debated in both Houses.

13 [Timeline - SI 2020/987 - Statutory Instruments - UK Parliament](#).

14 See [7th Report](#), Session 2019–21 (HL Paper 30).

15 Initial correspondence — [13th Report](#), Session 2019–21 (HL Paper 57).

16 [Electric Scooter Trials and Traffic Signs \(Coronavirus\) Regulations and General Directions 2020 \(SI 2020/663\)](#), [22nd Report](#), Session 2019–21 (HL Paper 104).

rights to extend existing buildings and a new planning category to enable a wider range of uses for existing buildings.¹⁷ While we noted in our report that the intention was to support the post-pandemic economic recovery, we raised the question whether it would have been more appropriate to have made these changes in a future Planning Bill, thereby enabling Parliament to scrutinise them more fully. **Using secondary legislation to make significant policy change that would be more appropriate for inclusion in a Bill does not promote effective scrutiny or good governance.**

Blurring of legislation and guidance

20. Quite early on in the pandemic, we drew to the attention of the House the need for a clear distinction between legislation and guidance.¹⁸ For example, guidance for the first lockdown said that “only one form of exercise a day” was allowed, whereas the legislation did not limit it in this way. In our 13th Report, we published an exchange of correspondence with the Secretary of State for Health and Social Care, the Rt Hon. Matt Hancock MP, who confirmed that it was the instrument and not the guidance which was legally enforceable.
21. **We remain concerned that the distinction between legislation and guidance continues to be unclear.** In our 35th Report, on an exemption to the travel restrictions to allow foreign poultry workers into the country,¹⁹ we noted that guidance said that the employer should provide a translation of the local lockdown restrictions and the worker should sign to say that he or she had understood them.²⁰ This provision was not included in the regulations.

Inadequate impact assessment

22. The absence of Impact Assessments for COVID-19 instruments has been another cause for concern. Many EMs have included the standard phrase “*because the instrument will cease to have effect after less than 12 months, a Regulatory Impact Assessment is not required and would be disproportionate*”. We have recently seen a number of these short-term measures being extended for a further six or eight months to cope with the second wave of the pandemic,²¹ but still without either an Impact Assessment or data on the legislation’s performance in the first six months. **We are aware that many of these costs are necessary to save lives but even a basic analysis of the impact or some financial information might help the House to weigh up conflicting priorities, such as public health versus the costs to industry.**
23. While we welcome the Government’s analysis of the health, economic and social effects of COVID-19 published at the end of November to support their

17 *25th Report*, Session 2019–21 (HL Paper 123).

18 *13th Report*, (paragraphs 41 to 45) Session 2019–21 (HL Paper 57).

19 Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 24) Regulations (*SI 2020/1292*) (2nd Item) *35th Report*, Session 2019–21 (HL Paper 177).

20 Defra, ‘Coming to England for seasonal poultry work on farms and processing sites’ (17 November 2020): <https://www.gov.uk/guidance/coming-to-england-for-seasonal-poultry-work-on-farms-and-processing-sites> [accessed 25 November 2020].

21 For example SIs [2020/1243](#), [1290](#) and [1296](#).

latest approach to tiering,²² it is very broad brush.²³ For each instrument, we believe that Departments should provide a specific explanation of how it will fit within that overarching assessment. How, for example, will allowing travellers from Mongolia or Kiribati to avoid self-isolation improve the economic recovery of the travel industry? Even basic information, such as the number of passengers arriving from those countries in a normal year, would better inform the House as to the impact of the legislation.

Restricting parliamentary scrutiny

24. We have been monitoring the speed with which instruments have come into effect during the pandemic. Of 261 instruments (affirmative and negative instruments) with ‘Coronavirus’ in the title:
- 72 (27.6%) were made affirmatives of which 35 came into effect before being laid;
 - 152 (58.4%) came fully into effect, and 12 (5%) partially into effect, within 48 hours of laying.
25. We understand that, in a public health crisis, urgent action may be required. In some cases, however, it has not been clear to us why an instrument had to come into effect so quickly, thereby denying Parliament an opportunity to debate the instrument before it came into force. We question why, for example, instruments relating to the sale of fresh Christmas trees²⁴ or allowing foreign poultry workers into the country²⁵ needed to take effect within 24 hours. **Parliamentary scrutiny is an important constitutional check on the use of executive power and should not be curtailed for anything but genuine emergencies.**
26. In our 19th Report,²⁶ we raised our concern that a number of COVID-19 instruments gave a power to the relevant minister to turn the pandemic requirements on or off. While this was pragmatic it was not transparent, particularly as the EM often simply said that the decision would be published on the Covid.gov.uk webpage which rapidly became very large indeed. We suggested that, in such cases, the EM should include specific information about how and where the outcome of any ministerial review was to be promulgated and how Parliament was to be kept informed. We welcome the fact that Departments have generally done this. **However, the correct balance between giving ministers the flexibility to act quickly and the need to keep Parliament informed should be examined in the evaluation of the emergency legislation.**
27. Another issue raised in our 19th Report was concern about the length of time between Government announcements and relevant legislation being

22 See the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020 ([SI 2020/1374](#)).

23 HM Government, *Analysis of the health, economic and social effects of COVID-19 and the approach to tiering* (30 November 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/939876/Analysis_of_the_health_economic_and_social_effects_of_COVID-19_and_the_approach_to_tiering_FINAL_SofS_.pdf [accessed 15 December 2020]).

24 The Health Protection (Coronavirus, Restrictions) (England) (No. 4) (Amendment) (No. 2) Regulations 2020 ([SI 2020/1326](#)).

25 Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 24) Regulations 2020 ([SI 2020/1292](#)); drawn to the attention of the House [35th Report](#), Session 2019-21 (HL Paper 177).

26 ‘Editorial’, [19th Report](#), Session 2019-2020 (HL Paper 84).

laid.²⁷ This point has been mentioned several times in debates in the House of Lords. For example, in July, Baroness Thornton moved the following motion:

“ ... to move that this House welcomes the introduction of the Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 (SI 2020/791), but regrets the delay in bringing forward the Regulations as Her Majesty’s Government has advised the public to wear face coverings in enclosed public spaces since 11 May, announced that face coverings would be mandatory in shops from 24 July on 14 July, and laid these Regulations under the made affirmative procedure on 23 July; further regrets that this delay has caused confusion over where people will have to wear face coverings due to the absence of detailed legal requirements being available in advance; and notes the concerns of the Secondary Legislation Scrutiny Committee in its 19th Report, published on 25 June, which urged Her Majesty’s Government “to ensure that the legislation follows on more closely from any announcement that they have made”.”

28. The same point has been raised in the House of Commons.²⁸ The legislation governing the second national lockdown expired on 2 December. It was followed by a new Tiers system, which was announced ten days before, and the BBC website provided a facility allowing people to check by postcode which Tier they would be in a week later, but the regulations were not laid until less than 36 hours before they were to come into effect. **We agree that the public need to be informed promptly, but Parliament needs to know first.**

27 See, for example, Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020 ([SI 2020/592](#)) *20th Report*, Session 2019-21 (HL Paper 92).

28 For example, HC Deb, 26 November 2020, [col 998](#), and prior to that, HC Deb, 30 September 2020, [col 331](#).

SKELETON BILLS AND SKELETON PROVISION

29. During the course of the year, we — with others — have become increasingly concerned about the growing tendency for the Government to introduce skeleton bills, in which broad delegated powers are sought in lieu of policy detail. As a result, in September, we, with the Constitution Committee and the Delegated Powers and Regulatory Reform Committee, wrote to the Rt Hon. Michael Gove MP, Minister for the Cabinet Office, and Mr Rees-Mogg raising our concern.²⁹ We said that, even taking into account the exceptional circumstances of withdrawal from the EU and the pandemic, “the bills which have been introduced into Parliament in response to them have been extraordinary in terms of the extent to which they have permitted a shift in power from the legislature to the executive” — this was a constitutionally fundamental issue –
- “... not only in terms of the relationship between Parliament and the executive but also more widely in terms of the relationship of trust between government and the public at large. Without substantive provision on the face of the Bill, Parliament is being asked to pass legislation without knowing how the powers conferred may be exercised by ministers and so without knowing what impact the legislation may have on members of the public affected by it.”
30. In reply,³⁰ Mr Rees-Mogg acknowledged that “as these are exceptional times, they do not necessarily provide a model example of how Parliament would like to see legislation brought forward”, a view with which we agree. We also agree with Mr Rees-Mogg’s statement that “Bills with substantial powers, though sometimes essential, should not be a tool to cover imperfect policy development”.
31. The implication of the use of skeleton legislation is that the instruments made under it may contain substantial policy changes which would be more appropriately subject to the greater scrutiny afforded primary legislation.
32. Reflecting the conclusions of our correspondence with Mr Rees-Mogg, **we urge the Government “to bring forward bills that contain clear policy intention instead of broad delegated powers” and to ensure that “Departments do not use the exceptional powers given to them by Parliament as an expedient in the context of the pandemic as a cloak for effecting longer term, post-pandemic changes which would more properly be included in primary legislation”**. We shall continue to pursue this important matter which goes to the heart of essential and effective Parliamentary scrutiny.

29 [Letter of 25 September 2020](#).

30 [Letter of 19 October 2020](#).

COMMITTEE ACTIVITY

33. In Year 1, we met 38 times and published 39 reports (including this one). Of the 901 instruments considered, we drew 60 (6.7%) to the special attention of the House, slightly below the average of about 7% a year. We think this may be because at least 20% of instruments considered had the limited purpose of adapting EU retained law and did not, therefore, involve substantive change in policy. Of the instruments reported, 18% were from BEIS and 18% from DHSC (mainly related to the pandemic). Unusually, a high proportion of instruments laid by MHCLG (nine or 15%) were drawn to the special attention of the House (mainly those related to changes to local planning legislation).
34. All but five of the 60 instruments drawn to the special attention of the House were on the ground of policy interest (92%). Of the five:
- one on the ground it may inappropriately implement European Union legislation:
 - Accreditation of Forensic Service Providers (Amendment) Regulations 2019 (SI 2019/1384)³¹
 - four on the ground that the Explanatory Memorandum provided insufficient explanation:
 - Homes and Communities Agency (Transfer of Property etc.) Regulations 2020 (SI 2020/31)
 - Prison and Young Offender Institution (Coronavirus) (Amendment) (No.2) Rules (SI 2020/508)
 - Electric Scooter Trials and Traffic Signs (Coronavirus) Regulations and General Directions 2020 (SI 2020/663)
 - Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 26) Regulations 2020 (SI 2020/1337)³²

Information paragraphs

35. In addition to drawing instruments to the special attention of the House, we alert the House to other instruments which appear to be of interest, are topical or follow an unusual process. We do this by means of short information paragraphs that act as a kind of “news service”. In Year 1, we published 339 information paragraphs on 395 instruments (44% of the total); this was unusually high because 220 of them related to COVID-19 instruments.
36. Early in the pandemic, we decided to provide an information paragraph on all SIs relating to COVID-19, irrespective of their significance, and listed them in a separate section of our reports.³³ They included not only lockdown measures but also, for example, planned schemes or requirements deferred as a result of the pandemic. All COVID-19 SIs are listed on a dedicated webpage³⁴ with links to Parliament’s Statutory Instruments Service — and therefore to both the original SI text, EMs and our reports. Some COVID-19 instruments of concern were instead drawn to the special attention of the House. These are also shown on the cumulative list on the webpage.

31 See *1st Report*, Session 2019-21 (HL Paper 6).

32 See respectively our *6th Report*, *16th Report*, *22nd Report* and *37th Report* of session 2019-21.

33 See *11th Report* onwards.

34 Secondary Legislation Scrutiny Committee, ‘Scrutiny of secondary legislation laid to tackle coronavirus pandemic’: <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/news/115532/scrutiny-of-secondary-legislation-laid-to-tackle-coronavirus-pandemic/>.

Chart 3: Instruments considered and reported by Department in year 1 of session 2019-21

Department	Total laid	%	Reported Affirmative	Reported Negative	Reason for report ³⁵						
					a	b	c	d	e	f	g
Attorney General	1	0.11	0	0	0	0	0	0	0	0	0
BEIS	112	12.43	7	4	11	0	0	0	0	0	0
Cabinet Office	15	1.66	2	0	2	0	0	0	0	0	0
DCMS	25	2.77	0	2	2	0	0	0	0	0	0
Defence	7	0.78	0	0	0	0	0	0	0	0	0
Defra	80	8.88	2	0	2	0	0	0	0	0	0
DExEU*	0	0.00	0	0	0	0	0	0	0	0	0
DIT	4	0.44	1	0	1	0	0	0	0	0	0
DWP/HSE	72	8.00	0	0	0	0	0	0	0	0	0
Education	33	3.66	0	3	3	0	0	0	0	0	0
FCO**	25	2.77	0	0	0	0	0	0	0	0	0
Government Equalities Office	0	0.00	0	0	0	0	0	0	0	0	0
Health***	126	13.98	7	4	11	0	0	0	0	0	0
Home Office	67	7.44	2	2	3	0	1	0	0	0	0
Justice	65	7.21	0	3	2	0	0	0	1	0	0
LGBCE	15	1.66	0	0	0	0	0	0	0	0	0
MHCLG	58	6.44	1	8	8	0	0	0	1	0	0
NIO	16	1.78	2	1	3	0	0	0	0	0	0
Privy Council	4	0.44	0	0	0	0	0	0	0	0	0
Scotland Office	8	0.89	0	0	0	0	0	0	0	0	0
Transport	102	11.32	1	4	3	0	0	0	2	0	0
Treasury/HMRC	66	7.33	2	2	4	0	0	0	0	0	0
Wales	0	0	0	0	0	0	0	0	0	0	0
Total	901		27	33	55	0	1	0	4	0	0

*Dissolved on 31 January 2020

**Now incorporates DFID and is known as Foreign, Commonwealth and Development Office

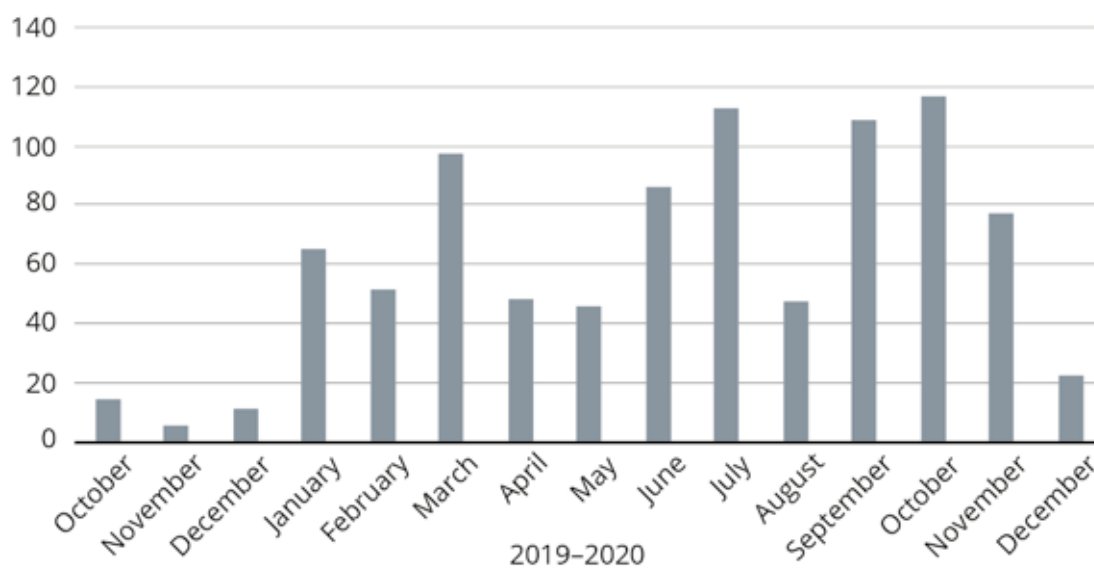
*** Includes Food Standards Agency

35 These are the grounds for report set out in our Terms of Reference: a) Policy interest b) changed circumstances since the Act c) inappropriately implements EU legislation d) may imperfectly achieve its policy objectives e) insufficient information f) inadequate consultation g) deals inappropriately with retained EU law.

Volume and flow

37. The Departments which laid the largest numbers of instruments considered in Year 1 were DHSC 126 (14%), BEIS 112 (12.4%), and DfT 102 (11.3%). Between them, they accounted for almost 40% (see Chart 3 above). We are pleased to note that the DfT instruments included several that addressed their implementation backlog, though more remains to be done.³⁶
38. At the end of the 2017-19 session, we welcomed the Government’s intention to regulate the flow of instruments by continuing the practice of requiring Departments to obtain approval from the Parliamentary Business and Legislation (PBL) Committee of the Cabinet before laying an SI. At that time, we recommended that the Government should review the approval process to evaluate where it has worked well and where there might be weaknesses. There have been significant peaks and troughs of activity in Year 1 — not all of which are explained by the exigencies of the pandemic. **We therefore reiterate our previous recommendation that the approval process should be reviewed.**

Chart 4: SIs laid by month in year 1 of session 2019-21



Overlarge complex SIs

39. We were also disappointed that, towards the end of Year 1, some large complex instruments were laid,³⁷ the most extreme example being a 507-page Statement of Immigration Rules.³⁸ In our report on the Immigration Rules we said that “combining so many policy areas in one very large instrument is wholly unjustified” and that its complexity made effective parliamentary scrutiny “virtually impossible”. **On previous occasions, we have commented adversely about large, wide-ranging instruments, a view which members of the House strongly supported in debate.**

36 See, for example, *17th Report*, Session 2019-21 (HL Paper 73).

37 For example: *Draft* Plant Health (Phytosanitary Conditions) (Amendment) (EU Exit) Regulations 2020 at 306 pages and *Draft* Product Safety and Metrology etc. (Amendment etc.) (UK(NI) Indication) (EU Exit) Regulations 2020 which although only 60 pages was extraordinarily convoluted.

38 *HC 813* – see our *33rd Report*, Session 2019-21 (HL Paper 161).

We urge the Government to refrain in the future from adopting this approach.

Withdrawal from the European Union

40. The number of Proposed Negatives (PNs) submitted under the European Union (Withdrawal) Act 2018 significantly diminished in Year 1, with only 32 received, of which two were recommended for upgrade to the affirmative procedure. This compares with 82 in calendar year 2019. Six (19%) of PNs laid had to be relaid due to significant errors. The decrease in PNs was not surprising as most of the required legislation for retained EU law was in place by the end of 2019. Most of this year's EU Exit instruments have been updates, and corrections, in particular to provide revised arrangements to implement the Northern Ireland Protocol to the Withdrawal Agreement.
41. Other instruments dealing with the UK's departure from the EU came late in the year (see Chart 1) and were predominantly laid by the Department for Environment, Food and Rural Affairs (Defra), HMT, HM Revenue and Customs and BEIS. Although these instruments did not introduce substantive policy change, we drew several to the special attention of the House because of their impact (for example, in relation to establishing a domestic regime for the regulation of chemicals³⁹ and preparing for new border arrangements⁴⁰) and, on occasion, our reports highlighted the complexities of implementing the Northern Ireland Protocol.⁴¹

Consultation

42. Given their urgency, most recent instruments have had minimal consultation, either because they relate to the pandemic or because systems are disrupted because of the pandemic. However, we have noted a number of creative approaches or short outreach projects by certain Departments, which we commend. We think that the resulting legislation will be more robust and more relevant as a result. For example, we welcomed the Department for Education's discussions with the Office of the Children's Commissioner, major children's charities and others when it prepared legislation to extend certain flexibilities in relation children's social care, after a lack of consultation on the earlier instrument was criticised.⁴²

Corrections

43. We are disappointed to note that SI corrections have reached almost double the 5% benchmark in Year 1. Some can be attributed to errors noticed after the legislation has been published,⁴³ which consultation might have prevented. Some have been due to procedural errors (such as the wrong

39 [Draft REACH etc. \(Amendment etc.\) \(EU Exit\) Regulations 2020](#), [34th Report](#), Session 2019-21, (HL Paper 172).

40 [Draft Customs Safety, Security and Economic Operators Registration and Identification \(Amendment etc.\) \(EU Exit\) Regulations 2020](#), [32nd Report](#), Session 2019-21 (HL Paper 159).

41 [Product Safety and Metrology etc. \(Amendment\) \(Northern Ireland\) \(EU Exit\) Regulations 2020 \(SI 2020/1112\)](#), [32nd Report](#), Session 2019-21(HL Paper 159).

42 [Adoption and Children \(Coronavirus\) \(Amendment\) \(No.2\) Regulations 2020 \(SI 2020/909\)](#), [26th Report](#), Session 2019-21 (HL Paper 126).

43 See the rubric on the [Education \(Student Fees, Awards and Support etc.\) \(Amendment\) Regulations 2020 \(SI 2020/46\)](#).

script signed by the Minister⁴⁴ or the script not signed at all⁴⁵) or drafting errors (such as the instrument being laid without a commencement date⁴⁶). Some have inadvertently omitted provisions (such as leaving out “public houses”,⁴⁷ or a particular council from certain lockdown instruments⁴⁸ or left redundant material in). In what has been an extraordinarily challenging year, it seems likely that these are all signs of Departments under pressure to produce instruments in a compressed timescale with insufficient time being set aside or available for checking.

Chart 5: Corrections in year 1 of session 2019-21

SIs	Number laid	SIs replaced by correction	EMs replaced by correction
Affirmative	308	47 (15.25%)	26 (8.44%)
Negative	593	39 (6.57%)	27 (4.53%)
Total	901	86 (9.54%)	53 (5.88%)

Conclusion

44. The Committee is very conscious of the twin pressures on the Government of the ending of the Brexit Transition Period against the background of the pandemic but the need for a clear explanation of the justification for legislation and for its intended consequences is even more vital when legislation affects so many people and is being produced at such speed. When we next see the Permanent Secretaries, we will raise with them the issues identified in this report. Some Departments have managed the production of their emergency legislation far more effectively than others, and we will be asking the Permanent Secretaries how the lessons of legislating in the pandemic can be captured and used to improve standards.
45. Raising the standards of legislation and increasing the effectiveness of parliamentary scrutiny is always important but never more so than in times such as these. It is to the achievement of these objectives that the Committee’s work is devoted.

44 For example, the Health Protection (Coronavirus, Restrictions) (North East of England) (Amendment) Regulations 2020 (revoked) ([SI 2020/1012](#)) were made within hours of [SI 2020/1010](#) to correct some defects in the previous instrument “due to a system error” and the Official Controls (Plant Health and Genetically Modified Organisms) (England) (Amendment) (No. 4) Regulations 2020 ([SI 2020/1089](#)) which replaced [SI 2020/1060](#).

45 Greater Manchester Combined Authority (Fire and Rescue Functions) (Amendment) Order 2020 ([SI 2020/641](#)), re-laid 2 June 2020.

46 [SI 2020/46](#) later replaced by [SI 2020/48](#).

47 [SI 2020/1028](#) corrects the omission in [SI 2020/1026](#).

48 See [SI 2020/1192](#).

APPENDIX 1: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at <http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests>. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 15 December 2020, Members declared no interests.

Attendance:

The meeting was attended by Baroness Bakewell of Hardington Mandeville, Lord Chartres, Lord Cunningham of Felling, Lord German, Viscount Hanworth, Lord Hodgson of Astley Abbotts, Lord Liddle, the Earl of Lindsay, Lord Lisvane, Lord Sherbourne of Didsbury and Baroness Watkins of Tavistock.